No. 1112

APR 15 1946

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

(OCTOBER TERM, A.D. 1945)

C. R. MOFFITT, alias CARVEL R. MOFFITT,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

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Of Counsel.

April, 1946.

UTTERBACK TYPESETTING CO., 18 S. Walker, Oklahoma City 4, Okla.

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PETITION FOR CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

The above-named petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On October 17, 1944, the petitioner was charged in the United States District Court for the Western District of Oklahoma, by indictment containing three counts, of entering into a plan, scheme and device, on or about March 7, 1944, with an individual known as George Harris or Ralph Howard, for the purpose of defrauding the Mudge Oil Company, of Pittsburgh, Pennsylvania, out of the sum

of $25,000.00 by the purported sale to it of worthless oil and gas leases, and the use of the mails in furtherance of such plan, scheme and device, under Criminal Code, Section 215 (18 U. S. C. A., Section 338) (R. 1-8). On October 24, 1944, petitioner filed a demurrer to each count of said indictment, which demurrer was overruled on that day, and thereupon said cause was set for trial on December 4, 1944 (R. 8-9).

On December 4, 1944, the trial of said cause was begun, and at the conclusion of the evidence in chief of the respondent the petitioner demurred thereto as to each count of said indictment, which demurrer was overruled (R. 9-10). On December 7, 1944, the trial of said cause was concluded and thereupon the petitioner filed a motion for a directed verdict as to each count of the indictment, which motion was overruled, and on December 8, 1944, shortly after midnight, the jury returned a verdict finding the petitioner guilty on each count of the indictment (R. 10-11).

On December 11, 1944, the petitioner filed a motion for a new trial, which was overruled on March 1, 1945, and thereupon the petitioner was sentenced for a term of five years, consecutively, upon each count of the indictment — a total of fifteen years, and committed to the United States Marshal (R. 12-13).

On March 1, 1945, shortly after the entry of said judgment and commitment, the petitioner filed and served his notice of appeal under the Rules of Criminal Procedure (R. 13-15), and on March 2, 1945, filed and presented

an application for bail pending appeal, which application was denied (R. 15). In due course he made an application to the United States Circuit Court of Appeals for bail pending appeal, which was granted and his bond fixed at $7,500.00, which he gave and was thereupon released from the County Jail of Oklahoma County as a Federal prisoner (R. 15-16).

In due course he perfected his appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and that Court, on March 15, 1946, affirmed said judgment and sentence as to Counts One and Two of said indictment and reversed the same as to Count Three thereof, by an order made and entered therein of that date (R. 495-503).

II.

DECISIONS BELOW

The trial court did not file an opinion. Its judgment and sentence is dated March 1, 1945 (R. 12-13). The opinion of the Circuit Court of Appeals was filed on March 15, 1946 (R. 495-502). It has not been officially reported. The judgment upon said opinion is dated March 15, 1946 (R. 502-503). No petition for rehearing was filed. On March 21, 1946, mandate was stayed (R. 503).

III.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

IV.

QUESTIONS PRESENTED

The following questions are presented:

(1) Under the Instructions as a whole did the trial court commit prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

(2) Under the Instructions as a whole did the trial court commit prejudicial error in giving the following Instruction:

"You are instructed that the rule of law which throws around a defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

(3) Did the trial court commit prejudicial error in overruling the motion of the petitioner at the conclusion of all of the evidence to direct the jury to return a verdict of not guilty as to Count Two of the indictment? (R. 11).

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which petitioner relies for the allowance of the writ are:

(1) The Tenth Circuit, in holding that the above-quoted Instruction on "intent" was not prejudicial, is in conflict with the rule announced by: (a) The Eighth Circuit [*Shaddy* v. *United States*, 30 Fed. (2d) 340; *Cummins* v. *United States*, 232 Fed. 844; *McCallum* v. *United States*, 247 Fed. 27]; (b) the Sixth Circuit (*McKnight* v. *United States*, 115 Fed. 972); and (c) the Seventh Circuit (*Hibbard* v. *United States*, 172 Fed. 66). Such rule is not in harmony with the rule announced by this Court (*Chaffee* v. *United States*, 85 U. S. 516, 21 L. Ed. 908; *Coffin* v. *United States*, 156 U. S. 432, 39 L. Ed. 481; *Agnew* v.

United States, 165 U. S. 36, 41 L. Ed. 624), and by the Tenth Circuit itself. [*Laws* v. *United States*, 66 Fed. (2d) 870].

(2) The Tenth Circuit, in approving the above-quoted Instruction on presumption of innocence, is in conflict with the Fifth Circuit [*Comila* v. *United States*, 146 Fed. (2d) 372; *Coffin* v. *United States*, *supra*]. Said Instruction is fundamentally wrong and limited and weakened the Instructions theretofore given upon "Presumption of Innocence" and "Reasonable Doubt."

(3) The Tenth Circuit, in holding that the evidence was sufficient as to the use of the mails as to Count Two of the indictment, announced a rule in conflict with the Eighth Circuit [*Brady* v. *United States*, 24 Fed. (2d) 399]; the Third Circuit [*Freeman* v. *United States*, 20 Fed. (2d) 748; *Davis* v. *United States*, 63 Fed. (2d) 545; *Whealton* v. *United States*, 113 Fed. (2d) 710]; the Seventh Circuit [*Mackett* v. *United States*, 90 Fed. (2d) 462]; the Second Circuit [*United States* v. *Baker*, 50 Fed. (2d) 122]; the Sixth Circuit (*Underwood* v. *United States*, 267 Fed. 412). The rule announced is apparently in conflict with its previous decision [*Rosenberg* v. *United States*, 120 Fed. (2d) 935].

(4) There is no conflict in the record as to the nature, character and extent of the evidence as to the proof of the use of the mails as to said Count Two, and there is presented the question of whether or not as a matter of law the motion for directed verdict as to this count should have been sustained.

WHEREFORE, It is respectfully submitted that this petition for writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

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SUPPORTING BRIEF

OPINIONS

The District Court filed no opinion. Its judgment and sentence is dated March 1, 1945. (The Record erroneously shows March 1, 1946). (R. 12-14). The Opinion of the Circuit Court of Appeals was filed on March 15, 1946 (R. 495-502). It has not been officially reported. The judgment upon said opinion is dated March 15, 1946 (R. 502-503). No petition for rehearing was filed. On March 21, 1946, the judgment of that Court affirming the conviction as to Counts One and Two of the indictment and reversing the same as to Count Three thereof was stayed (R. 503).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

STATEMENT OF THE CASE

The indictment contains three counts and was returned and filed on October 17, 1944 (R. 1-8). It is alleged in this indictment that on or about March 7, 1944, the petitioner entered into a plan and scheme with George Harris or Ralph Howard, for the purpose of defrauding

the Mudge Oil Company, of Pittsburgh, Pennsylvania, out of the sum of $25,000.00 by the purported sale to it of worthless oil and gas leases, and the use of the mails in furtherance of said plan and scheme, under Criminal Code, Section 215 (18 U. S. C. A., Section 338). The petitioner demurred separately to each count of the indictment. His demurrer was overruled, and he entered a plea of not guilty to each count. He was convicted upon each count, and sentenced for a term of five years, consecutively, or a total of fifteen years. The Circuit Court reversed the conviction as to Count Three and affirmed the conviction as to Counts One and Two.

The petitioner was engaged in the oil and gas business at Blackwell, Oklahoma, when he was charged, and had been for some time prior thereto. He did business both individually and as the American Oil and Gas Company. During March, April and May, 1942, Charles M. Day, of Blackwell, Oklahoma, acquired a block of oil and gas leases commercial upon their face covering 2240 acres of land in Sections 23, 24, 25 and 26, Township 28 North, Range 1 East, Kay County, Oklahoma, near the town of Peckham therein, and hereinafter referred to as the "Peckham Block." A list of these leases appears on page 403 of the Record. Each of these leases is a commercial one, but there was an escrow agreement entered into between the lessor and lessee simultaneously with the execution of the lease and attached thereto, which agreement rendered each lease non-commercial. These leases and the various escrow agreements attached thereto were placed in escrow with

the Security National Bank, Blackwell, Oklahoma, on or about May 21, 1942.

On May 22, 1942, a written contract was made and entered into by and between Day as first party and petitioner as second party by which he acquired said leases and agreed to comply with the terms and provisions thereof, including said escrow agreement (R. 433-436). A duplicate of this agreement was delivered to said bank and became a part of its escrow files with reference to the Day leases. Under this contract petitioner agreed to commence the drilling of a well on some portion of the leased area by July 10, 1942.

In addition to the leases listed on page 403 of the Record three additional leases running to Day, which were assigned by him to petitioner, were placed in said bank on or about January 7, 1943 (R. 438). The escrow file of the bank, being a large envelope kept by L. C. Wright the President of said bank, was identified as Defendant's Exhibit "E," and certain portions of said file were introduced in evidence (R. 78-87).

On or about July 10, 1942, the petitioner commenced drilling operations upon the Sarah Jane Carroll lease covering the Southwest Quarter (SW¼) of Section 24, Township 28 North, Range 1 East, being one of the leases escrowed. After he commenced these drilling operations he endeavored, without success, to induce the bank to deliver him the escrowed leases. Later, however, he secured a number of said leases including th Carroll lease. He sold 640 acres of the escrowed oil and gas leases situ-

ated in and around the Carroll lease to the Mudge Oil Company through Ralph B. Howard as its agent, for $25,000.00 with the agreement to pay Howard back the sum of $15,000.00.

On March 3, 1944, Ralph B. Howard, of Pittsburgh, Pennsylvania, registered at the Larkin Hotel, Blackwell, Oklahoma, Room No. 406. He checked out on Monday, March 6, 1944 (R. 455). The petitioner, as he contends, never knew or heard of Howard until he came to Blackwell on the above date and introduced himself to the petitioner as a representative of the Mudge Oil Company, in the Land Department thereof. Howard examined the leases and agreed to buy 640 acres in and around the Carroll lease on behalf of his Company for $25,000.00 with the understanding that petitioner would pay him back $15,000.00. The deal was closed on this basis on or about March 6, 1944, and on that date Howard delivered to petitioner the Mudge Oil Company check, dated March 4, 1944, for $25,000.00, drawn on the Mellon National Bank, Pittsburgh, Pennsylvania (R. 3). At the time petitioner received said check he as the American Oil and Gas Company delivered to Howard a letter acknowledging the receipt of said check and giving a list of the leases sold aggregating 640 acres (R. 326).

On March 7, 1944, the petitioner endorsed and deposited said check in the First National Bank, Blackwell, Oklahoma, in the name of the American Oil and Gas Company, and received a deposit slip showing such deposit. He gave no directions or instructions as to how the bank

should handle the item, but the petitioner understood the item would go through as a collection one and that the deposit was not subject to check until said check cleared. The Blackwell bank, in due course, by mail, sent said item to the Guaranty Trust Company, New York, for collection, and in due course the check was presented to the Mellon National Bank, and paid. On March 20, 1944, the Blackwell bank drew a draft on the Liberty National Bank of Oklahoma City, Oklahoma, for $25,000.00, payable to the American Oil and Gas Company, and delivered the same to the petitioner (R. 339). On March 21, 1941, the petitioner met Howard in Oklahoma City and delivered to him $15,000.00 of the proceeds of said draft, retaining the balance for himself. The petitioner executed and delivered to Howard an assignment in blank of each of said leases, together with a certificate of title thereto. These assignments were never filed for record. The indictment sets out the respective alleged use of the mails as to each count thereof.

The Mudge Oil Company had two offices, one at Pittsburgh, Pennsylvania, and the other at Dallas, Texas. The Dallas office was the active one, and most of the Company's business was transacted through it. The cancelled checks drawn on the Company's bank account in Pittsburgh were sent to the Dallas office, and early in April, 1944, the Dallas office, in examining the cancelled checks for the month of March, found this $25,000.00 check and observed that it was a forgery. In due course this situation was made known to the Mellon Bank and it

restored the $25,000.00, and as a matter of fact the Mudge Oil Company sustained no loss. On or about April 20, 1944, petitioner learned that it was claimed that said check was a forgery. He did not think so at that time, and believed in good faith when the check was delivered that it was a genuine one. The check, however, was a forgery, but a clever one.

The Peckham leased area was valuable as a wildcat development program and the leases sold to the Mudge Oil Company had a substantial value, in the judgment of petitioner. The 640 acres of oil and gas leases which petitioner thought, as he contends, he sold to the Mudge Oil Company were valuable at the time and had a considerable potential value, in the judgment of the petitioner, and his proof tended to support him in this regard. It was the theory of the respondent that the Peckham leased area was of but little value, and that the leases purportedly sold to the Mudge Oil Company had but little value. The question of the good or bad faith of the petitioner is presented by the record. There was a sharp conflict in the evidence as to the value of the leases purportedly sold. The petitioner made an honest effort, as he contends, to develop the leasd area under the terms and provisions of his contract with Day. He went to Pittsburgh, Pennsylvania, two or three times to secure financial aid in carrying on the development program but without success. He claims he dealt with Howard in good faith, believing that he represented the Mudge Oil Company, and had no knowledge at the time he received the check that the same was a forgery.

SPECIFICATIONS OF ERROR

(1) Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

and the Circuit Court erred in not so holding.

(2) Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are instructed that the rule of law which throws around a defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

and the Circuit Court erred in not so holding.

(3) The District Court erred in overruling the mo-

tion of the petitioner for a directed verdict as to Count Two of the indictment, for the reason that the evidence was wholly insufficient to show the use of the mails as to said Count, and the Circuit Court erred in not so holding (R. 11).

SUMMARY OF THE ARGUMENT

POINT I.

Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

and the Circuit Court erred in not so holding.

POINT II.

Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are instructed that the rule of law which

> throws around a defendant the presumption of innocense and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

and the Circuit Court erred in not so holding.

POINT III.

The District Court erred in overruling the motion of the petitioner for a directed verdict as to Count Two of the indictment, for the reason that the evidence was wholly insufficient to show the use of the mails as to said Count, and the Circuit Court erred in not so holding (R. 11).

ARGUMENT

Point I.

We have heretofore set out this Point and will not repeat it here.

In determining whether or not a given portion of the Instructions is prejudicial, the Instructions as a whole must be considered. The two essential elements of the offenses charged are: (1) The formation and existence of the scheme to defraud the Mudge Oil Company; and

(2) The use of the mails in furtherance thereof. As to the first essential, a criminal intent to defraud must be shown beyond a reasonable doubt and this question is a factual one for the Jury under appropriate Instructions. *Rice* v. *United States* (10th Cir.), 149 Fed. (2d) 601; *Estep* v. *United States* (10th Cir.), 140 Fed. (2d) 40.

Criminal intent being an essential element of the alleged scheme to defraud, the presumption is that the petitioner intended the natural and reasonable consequences of his acts knowingly done. This presumption, however, is a rebuttable one and the burden was upon the respondent to establish his criminal intent beyond a reasonable doubt, notwithstanding such presumption. The District Court, in the use of the following language in the above-challenged Instruction:

> "But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act."

in effect advised the Jury, as a matter of law, that the criminal intent of the petitioner should be determined by his acts and conduct, without regard to his intent, or the lack of it, to defraud, or his good or bad faith, and the giving of such Instruction was fundamental error which was not cured by the other Instructions.

Laws v. *United States* (10th Cir.), 66 Fed. (2d) 870;

Shaddy v. *United States* (8th Cir.), 30 Fed. (2d) 340;

McKnight v. *United States* (6th Cir.), 115 Fed. 972;

Hibbard v. *United States* (7th Cir.), 172 Fed. 66;

Cummins v. *United States* (8th Cir.), 232 Fed. 844;

McCallum v. *United States* (8th Cir.), 247 Fed. 27;

Chaffee v. *United States*, 85 U. S. 516, 21 L. Ed. 908;

Coffin v. *United States*, 116 U. S. 432, 39 L. Ed. 481;

Agnew v. *United States*, 165 U. S. 36, 41 L. Ed. 624.

POINT II.

Considering the Instructions as a whole, the challenged Instruction under this Point lessened and weakened the Instructions theretofore given as to the presumption of innocence and reasonable doubt, and was fundamentally wrong.

Comila v. *United States*, 146 Fed. (2d) 372;

Coffin v. *United States*, *supra*.

POINT III.

The proof of the use of the mails as to Count One of the indictment was sufficient. *United States* v. *Kenofskey*, 243 U. S. 440, 61 L. Ed. 836. The alleged use of the

mails as to Count Two of the indictment is what is termed "Paid Advice" (R. 5-6). This advice was introduced in evidence as Government's Exhibit "8" (R. 50), and appears in the Record at page 337. The only oral testimony as to the use of the mails with reference to this advice is the testimony of W. W. Chambers, Cashier First National Bank, Blackwell, Oklahoma. His testimony in full appears in the Record at pages 48-57. The envelope containing this alleged mailed communication was not presented and no reference is made thereto. There is no proof that this communication was mailed in New York or elsewhere, and the only proof, if any, is the communication itself and the receipt thereof by the Blackwell bank, through the mails. This proof, in our judgment, was wholly insufficient to show the use of the mails as applied to Count Two of the indictment, and the motion of the petitioner for a directed verdict as to this count should have been sustained, and the Circuit Court erred in not so holding.

Brady v. *United States* (8th Cir.), 24 Fed. (2d) 399;

Freeman v. *United States* (3rd Cir.), 20 Fed. (2d) 748;

Davis v. *United States* (3rd Cir.), 63 Fed. (2d) 545;

Whealton v. *United States* (3rd Cir.), 113 Fed. (2d) 710;

United States v. *Baker* (2nd Cir.), 50 Fed. (2d) 122;

Mackett v. *United States* (7th Cir.), 90 Fed. (2d) 462;

Underwood v. *United States* (6th Cir.), 267 Fed. 412;

Rosenberg v. *United States* (10th Cir.), 120 Fed. (2d) 935.

Respectfully submitted,

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April, 1946.

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CITATIONS

693514—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1112

C. R. MOFFITT, ALIAS CARVEL R. MOFFITT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 495–502) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1946 (R. 502–503). The petition for a writ of certiorari was filed April 15, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether proof that a letter was received through the United States post office is sufficient to prove use of the mails.

2. Whether the judge properly instructed the jury on the issue of intent.

3. Whether a charge that the presumption of innocence was not designed to enable one who was in fact guilty to escape just punishment constitutes reversible error.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *

[1] The petition was filed within 30 days, exclusive of Sundays and holidays, from the date of the judgment of the Circuit Court of Appeals, as allowed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, but more than 30 calendar days after the judgment, as allowed by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, effective March 21, 1946. Since the petition seeks review of a judgment entered prior to the effective date of the new rules, we do not contest its timeliness. See Rule 59 of the Rules of Criminal Procedure, providing that, "so far as just and practicable," the rules govern all criminal proceedings which were pending on their effective date.

> shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in three counts was returned against petitioner in the United States District Court for the Western District of Oklahoma, charging use of the mails in furtherance of a scheme to defraud the Mudge Oil Company by purporting to sell it worthless oil leases (R. 1–8). Petitioner was convicted on all three counts (R. 11), and was sentenced to imprisonment for five years on each count, the sentences to run

consecutively (R. 12–13). On appeal, the judgment was reversed as to the third count and affirmed as to the first two (R. 502–503).

The evidence for the Government may be summarized as follows:

In the Spring of 1942, petitioner acquired from one Charles Day a block of five-year oil and gas leases which were held in escrow by the Security Bank of Blackwell, Oklahoma, until commencement of the digging of a well (R. 78–80, 302; Gov. Exs. 21–25, R. 110, 375–386; Def. Exs. F., R. 79–80, 433–436, K, R. 87, 441–442, and 52–57, R. 183–184, 457–465). In July of 1942, petitioner endeavored to have the bank turn the leases over to him but the bank refused to do so on the ground that he had merely set surface pipe and had not commenced the digging of the well (R. 82, 90–91). No further work was performed, but in September 1943, after the escrow agreement had expired, petitioner obtained a number of these leases by agreement with the land owners (R. 85–88, 270–273; Def. Exs. J. and K, R. 87, 440–443). Wells drilled in the general location of these plots showed the area to be unfavorable as a source of gas and oil (R. 126, 143–145). As of March 1944, the value of leases in the area was about $1 per acre (R. 137, 144). Petitioner admitted on the stand that he could at any time have obtained the leases by paying $1 per acre to the land owners (R. 302).

In March of 1944, petitioner purported to sell leases on 640 acres to the Mudge Oil Company for $25,000 (R. 277; Def. Ex. Q, R. 174, 453). Petitioner's version of the transaction, as given in a statement to agents of the Federal Bureau of Investigation and in his testimony on the stand, was that one Ralph Howard, who represented himself as a member of the land department of the Mudge Oil Company, called on him on Saturday, March 4, 1944, and expressed interest in the leases. Howard told petitioner that he was authorized to spend $25,000, but that he thought that $10,000 was a good price for petitioner's acreage; that he would therefore pay $25,000 for 640 acres, but that he expected $15,000 back. That evening, Howard told petitioner that the deal had been approved. About noon on Monday, March 6, Howard gave petitioner a $25,000 check of the Mudge Oil Company drawn on the Mellon bank in Pittsburgh. No abstracts of title were furnished and no leases were delivered or assigned at the time. Immediately thereafter, Howard left town. Petitioner deposited the check for collection in his bank in Blackwell. About two weeks later, the bank gave him its cashier's check for $25,000, which he had cashed by his attorney in Oklahoma City. After receiving the money, petitioner met Howard in Oklahoma City and gave him $15,000 in cash. He never saw Howard again. (R. 28–32, 276–282, 291–293.)

The check purporting to be that of the Mudge Oil Company was a forgery (R. 58, 70, 77).

The first count of the indictment was based on the mailing of the $25,000 check by the Blackwell bank to its correspondent bank, the Guaranty Trust Company of New York, for collection (R. 2–5, 48–49; Gov. Exs. 4 and 5, R. 49, 329, 331).[2] The second count was based on the mailing of a "paid advice" from the Guaranty Trust Company of New York to the Blackwell bank, informing the latter that the check had been paid (R. 5–6, 50; Gov. Ex. 8, R. 51, 337).

ARGUMENT

1. The cashier of the Blackwell bank testified that the "paid advice" which formed the basis of the second count had been received by mail through the United States post office addressed to the bank (R. 50). Petitioner argues (Pet. 6, 14–15, 16, 18–20) that proof of receipt of this document through the post office was insufficient to establish that the mails were used. Obviously, however, if the letter was received from the post office the mails were used in the transmission thereof. The cases which petitioner cites (Pet. 19–20) deal with situations where proof of use of the mails was based on custom, not on direct

[2] Petitioner admitted on the stand that he did not expect to receive the money for the check immediately upon deposit (R. 279). The cashier of the bank testified that he told petitioner that the money would not be paid until the check had been cleared (R. 48).

testimony of receipt, or where receipt of a letter was held insufficient to prove that a particular person had mailed it. In this case, the Government did not contend and was not required to prove that petitioner had himself mailed the letter which formed the basis of the second count. His liability was predicated on the fact that he had caused the use of the mails by depositing the check for collection knowing that the mails would be used to transmit it and to report payment thereon. Petitioner does not deny that the use of the mails to report payment was a reasonably foreseeable consequence of his act in depositing the check for collection, and that he therefore may properly be held to have caused the mailing. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Kenofskey,* 243 U. S. 440, 443; *United States* v. *Weisman,* 83 F. 2d 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Shea* v. *United States,* 251 Fed. 440, 447 (C. C. A. 6), certiorari denied, 248 U. S. 581; *Spear* v. *United States,* 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667; *United States* v. *Decker,* 51 F. Supp. 15, 18 (D. Md.), affirmed, 140 F. 2d 378 (C. C. A. 4), certiorari denied, 321 U. S. 792.

2. The judge instructed the jury that one element of the offense of mail fraud was the formation of a scheme with intent to defraud. He then stated (R. 315–316):

> You are further instructed that the question of intent is one that is hard to

establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act.

As to the alleged scheme or artifice of the defendant with George Harris, alias Ralph Howard, to defraud the *Modge* Oil and Gas Company, the burden is upon the United States to prove such scheme and artifice as alleged in the indictment. The defendant is presumed to be innocent of forming and going into such scheme and artifice, and the burden is upon the United States to prove, by competent evidence beyond a reasonable doubt, that he formed and entered into such scheme and artifice with intent upon his part to defraud said oil company, and if, upon consideration of all of the evidence and testimony which the Court has permitted you to receive and consider, you entertain a reasonable doubt as to whether the defendant formed and entered into such scheme and artifice with intent upon his part to defraud said oil company, then you should acquit him.

> On the other hand, if you find from the evidence, beyond a reasonable doubt, that the defendant actually believed in good faith that the check was genuine; that the leases were worth $10,000; and that the Mudge Oil Company had authorized Howard to take back in cash the $15,000, or that Howard would account to the Mudge Oil Company for same, then the defendant had no intention to defraud and it will be your duty to return a verdict of not guilty.

Subsequently, he amended the last paragraph of this portion of his charge to begin as follows:

> If you find from the evidence, or if you entertain a reasonable doubt thereof, that the defendant actually believed in good faith that the check was genuine * * * (R. 319).

Petitioner attacks the instruction on intent (Pet. 4, 5–6, 14, 15–18) as failing to charge that the presumption that a person intends the natural and probable consequences of his act is rebuttable. However, the judge in substance so stated when he charged that the presumption was applicable "unless the testimony satisfies you of something else." Furthermore, he related his general charge on intent to the facts of the case by stating that petitioner was not guilty if he believed in good faith that the check was genuine and that the leases were worth the price for which they had been sold. It is thus clear, as the court below

held (R. 498–499), that the district judge properly instructed the jury on the issue of intent.

3. The judge also instructed the jury that a defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, and he defined reasonable doubt (R. 312–313). He then stated that the presumption was not intended to shield from just punishment one who was actually guilty (R. 313). Petitioner excepted to this portion of the charge (R. 318), and now urges that it constituted reversible error (Pet. 5, 6, 14, 15–16, 18).

He relies on *Gomila* v. *United States,* 146 F. 2d 372, in which the Circuit Court of Appeals for the Fifth Circuit reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one given here. That the court did not consider the mere giving of such an instruction a ground for reversal is shown by its refusal to reverse the conviction in another case in which the same statement was made in an instruction. *Pasqua* v. *United States,* 146 F. 2d 522 (C. C. A. 5), certiorari denied, 325 U. S. 855 (see the Government's brief in opposition in that case, No. 1047, October Term 1944, pp. 9–13). It is doubtful that the criticism of the charge in the *Gomila* case is sound. In essence, it is not very different from the charge approved by this Court in *Allen* v. *United States,* 164 U. S. 492, 500, a capital case. See also *Boehm* v. *United*

States, 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. A similar instruction has recently been urged as error before this Court in two cases in which certiorari was denied. *Pasqua* v. *United States, supra; United States* v. *Carruthers,* 152 F. 2d 512 (C. C. A. 7), certiorari denied, No. 763, this Term, March 11, 1946.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question requiring review for other reasons. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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